

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2016 JUL 18 AM 11:23

BCMS PARTNERS, LP D/B/A
RIOUX CAPITAL,

PLAINTIFF,

V.

KALAMATA CAPITAL, LLC,

DEFENDANT.

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CAUSE NO. A-16-CV-241-LY

ORDER ON REPORT AND RECOMMENDATION

Before the court are Defendant's Motion to Dismiss filed March 4, 2016 (Doc. #4); Plaintiff BCMS Partners, LP d/b/a Rioux Capital's Response in Opposition to Defendant's Motion to Dismiss filed March 18, 2016 (Doc. #5); Kalamata Capital, LLC's Reply Memorandum in Support of Defendant's Motion to Dismiss filed March 24, 2016 (Doc. #6); and Plaintiff BCMS Partners, LP d/b/a Rioux Capital's Surreply in Opposition to Defendant's Motion to Dismiss filed April 4, 2016 (Doc. #12). The motion, response, and replies were referred to the United States Magistrate Judge for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The magistrate judge filed his Report and Recommendation on June 22, 2016 (Doc. #16), recommending that this court grant the motion to dismiss and dismiss Plaintiff's action against Defendant without prejudice in favor of the pending federal action in Maryland.

Plaintiff BCMS Partners, LP D/B/A Rioux Capital's Objections to Magistrate Judge's Report and Recommendation was filed July 6, 2016 (Doc. #17). In light of Plaintiff's objections the court has undertaken a *de novo* review of the entire case file and finds that the magistrate judge's

Report and Recommendation should be approved and accepted by the court for substantially the reasons stated therein.

Plaintiff BCMS Partners, LP d/b/a Rioux Capital's objections raise the same arguments well and properly addressed by the magistrate judge in his Report and Recommendation. The first-to-file rule provides that once it is shown that there is substantial overlap between two cases, the court in which the case is first-filed decides which of the two cases should proceed. *See Cadle Company v. Whataburger of Alice, Inc.*, 174 F.3d 599, 605–06 (5th Cir. 1999); *Save Power Limited v. Syntek Finance Corporation*, 121 F.3d 947, 950 (5th Cir. 1997). Courts will not allow a party to secure its preferred forum by filing an action for a declaratory judgment when it has notice that another party intends to file suit involving the same issues in a different forum. *See 909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990). Lengthy negotiations and the tenor of the party's relations are likely to evidence an expectation that suit will be filed. *See Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 96 (5th Cir. 1992); *Mission Ins. Co. v. Puritan Fashins Corp.*, 706 F.2d 599, 601 (5th Cir. 1983). This declaratory-judgment action was filed less than a week before the end of the parties' second standstill agreement when Defendant Kalamata Capital, LLC indicated that it intended to file suit in Maryland. Therefore, the court finds that the three factors in *St. Paul Ins. Co. v. Trejo*¹ addressing forum shopping in anticipation of litigation, factors (2), (3), and (4), all weigh against the exercise of discretion to hear the declaratory-judgment action before this court.

IT IS THEREFORE ORDERED that Plaintiff BCMS Partners, LP D/B/A Rioux Capital's Objections to Magistrate Judge's Report and Recommendation are **OVERRULED**.

¹ 39 F.3d 585, 590–91 (5th Cir. 1994).

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Magistrate Judge (Doc. #16) is **ACCEPTED AND ADOPTED** by the court for the reasons stated herein.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss filed March 4, 2016 (Doc. #4); Plaintiff BCMS Partners, LP d/b/a Rioux Capital's Response in Opposition to Defendant's Motion to Dismiss filed March 18, 2016 (Doc. #5) is **GRANTED**.

IT IS FURTHER ORDERED that all of Plaintiff BCMS Partners, LP d/b/a Rioux Capital's claims against Defendant Kalamata Capital, LLC are **DISMISSED WITHOUT PREJUDICE**.

SIGNED this 18~~th~~ day of July, 2016.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE